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91-1768

Supreme Court, U.S.
FILED
MAY 5 1992
OFFICE OF THE CLERK

CASE NUMBER

SUPREME COURT OF THE

UNITED STATES

OCTOBER 1991 TERM

RICKY THOMAS MCCARTY, PETITIONER

V.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI

TO THE SUPREME COURT

OF KENTUCKY

PETITION FOR CERTIORARI

COUNSEL OF RECORD FOR RICKY THOMAS MCCARTY

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Question presented for review.

Is it a denial of an accused's right to due process under the 14th Amendment to the U. S. Constitution to permit a sentence to stand in a case where the prosecutor in his closing argument in a felony sentencing trial deliberately misled the jury with argument which he knew to be false and which was material to the punishment issue to be determined by the jury, in the circumstance where the misconduct had an unfair prejudicial impact on the jury's deliberations and undermined the fundamental fairness of the sentencing trial, and in the circumstance where the accused contemporaneous with the false and misleading argument objected and moved for mistrial?

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Opinions Below.

In the case of Ricky Thomas McCarty v. Commonwealth of Kentucky the McCracken Circuit Court entered its final judgment and sentence of imprisonment on March 20, 1990. Said judgment is not reported. The Kentucky Court of Appeals entered its opinion Affirming the judgment of the circuit court on March 8, 1991. Said opinion is not published. On July 26, 1991 the Court of Appeals entered Order Denying Petition for Rehearing. Said Order is not published. On February 5, 1992 the Supreme Court of Kentucky entered Order Denying Discretionary Review. Said Order is not published.

1. Grounds on which jurisdiction is invoked. The Supreme Court of Kentucky entered Order Denying Discretionary Review in this matter on February 5, 1992. It is believed that 28 U. S. C. Sec. 1257 confers jurisdiction to review by writ of certiorari.

2. The law involved. The constitutional provision which the case involves is the 14th Amendment to the Constitution of the United States, Section 1, which states as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

3. Statement of the case. This case began with the indictment of Ricky Thomas McCarty on July 21, 1989 by the McCracken County Grand Jury on the Class D Felony offense of operating a motor vehicle while his license was suspended as a result of revocation for driving under the influence, third or subsequent offense. McCarty was also charged with three misdemeanor offenses: driving under the influence, third or subsequent offense; speeding; and third degree escape. At arraignment McCarty entered a plea of not guilty, and the case was set for a pretrial conference for January 26, 1990.

Prior to the pretrial conference, as was the custom of the Commonwealth's Attorney, a written offer of a deal in exchange for a guilty plea was communicated

to McCarty's attorney. In exchange for McCarty changing his plea to guilty, the Commonwealth's Attorney offered to recommend that McCarty be sentenced to two years in prison. A pretrial conference, stenographically reported, was held on January 26, 1990. The trial judge asked McCarty if his attorney had informed him of the proffered deal. McCarty stated yes. McCarty then informed the prosecutor, Mr. Osborne, and the trial judge that he did not accept. Jury trial date was then set for February 1, 1990.

A jury trial was held on February 1, 1990 as to guilt or innocence, and then a second jury trial was held on February 1, 1990 as to punishment with the jury returning its verdict in that trial in the evening of February 1, 1990. The escape charge was dismissed before trial, and the speeding charge was dismissed after trial. The jury returned guilty verdicts on the suspended

license and driving under the influence charges.

McCarty faced a punishment range on the felony suspended license charge of one to five years in the state penitentiary. During closing argument in the punishment trial the prosecutor, Mr. Osborne, deliberately misled the jury with argument which he knew to be false and which was material to the punishment issue to be determined by the jury. Contemporaneous with this false and misleading argument McCarty's attorney ojjected, stating "I object to that. That's not true." McCarty's attorney requested the ruling of the trial judge. The trial judge stated "This is argument, the objection is overruled." McCarty's attorney then moved for a mistrial and again requested the ruling of the trial judge. The trial judge stated "I deny your motion for a mistrial." Pages 229 and 230 of the transcript of trials contain this matter. McCarty's attorney also

filed a written motion for a new trial on that basis, which was overruled by the trial judge.

In Kentucky state courts the prosecution makes the last closing argument, with the defense having no right of rebuttal. After presentation of the closing argument referred to above the jury fixed McCarty's punishment at four years in the state penitentiary. Final judgment was entered by the McCracken Circuit Court on March 20, 1990, with the trial judge imposing a sentence of three-and-one-half years.

McCarty raised this issue before the Kentucky Court of Appeals and the Supreme Court of Kentucky, claiming that this misconduct by the prosecution deprived him of a fundamentally fair sentencing trial. The Court of Appeals entered its opinion denying him relief on March 8, 1991, which is contained in the appendix to this petition. On July 26, 1991 the Court of Appeals

also denied McCarty's petition for rehearing, and six-and-one-half months later the Supreme Court of Kentucky also denied relief, on February 5, 1992.

4. Argument. Rule 10 provides the considerations for review by the Supreme Court of the United States on a writ of certiorari. McCarty states that the Supreme Court of Kentucky has decided an important question of federal law in a way that conflicts with applicable decisions of the Supreme Court of the United States.

In the McCarty case the Court of Appeals entered its opinion on March 8, 1991, a copy of that opinion being contained in the appendix to this petition. On the last page of the opinion the Court of Appeals stated as follows. "Overall, we perceive that McCarty received his guaranteed due process right to a 'fundamentally fair' sentencing hearing. Smith v. Commonwealth,

Ky., 734 S.W.2d 437 (1987)" Smith v. Commonwealth is a published decision of the Supreme Court of Kentucky. The Supreme Court of Kentucky stated as follows on page 452 first column of the Smith decision:

> "Smith was not deprived of a fair trial and rational sentencing by the alleged misconduct of the prosecutor during the penalty phase.
>
> United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), provides that the prosecutor's statements or conduct must be viewed in the context of the trial and only by so doing can it be determined whether the conduct affected the fairness of the trial."

The holding in the Young case is precise and specifically defined. The holding in Young addresses prosecutorial misconduct in the circumstance of absence of

timely objection by the defense. As stated at page 15 of Young the purpose is to temper "the blow of a rigid application of the contemporaneous-objection requirement." The interpretation of Young at page 452 of the Smith decision is not limited by the Supreme Court of Kentucky to the circumstance where there is an absence of contemporaneous objection by the defense. The Kentucky attorney general's office in its briefs, both to the Court of Appeals and to the Supreme Court of Kentucky, relied on the interpretation of Young contained in the Kentucky Smith decision to oppose reversal in the McCarty case. In fact, in the McCarty case there were both contemporaneous objection and motion for mistrial by the defense. The Supreme Court of Kentucky's interpretation of Young in Smith and application of that interpretation by both the Court of Appeals and the Supreme

Court of Kentucky to the McCarty case are in conflict with the holding in Young.

Kentucky case law specifically permits reference in closing argument to current events, well known historical events, and matters of common knowledge. See Shelley v. Chilton's Adm'r, 32 S.W.2d 974 (1930) and Trevathan v. Commonwealth, 384 S.W.2d 500 (1964). Deals in criminal cases are a matter within common knowledge. For whatever reason, the Court of Appeals omitted a critical statement which should have been contained in the quotation of McCarty's closing argument in the Court of Appeals' opinion. Immediately preceding the quoted part McCarty's counsel stated to the jury "if you read the paper". Then reading from page 224 of the trials tanscript the Court of Appeals opinion should state as the relevant portion of closing that McCarty's counsel, Mr. Bodell, stated: "if you read the paper, people

make plea bargains, they make deals, they have some major crime and they get probated for so many years, but Ricky McCarty came to court and faced 12 people ...." That portion of the argument was nothing more than a reference to a matter within common knowledge and to what was obvious to the jury that McCarty by participating in this trial with this jury did not make a deal. The Kentucky attorney general relied on the case of Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166 (1978). In the Wiley case at page 167 the defendant specifically testified to the jury "they offered me five years on this and I wouldn't take it." In Wiley the trial judge then declared a mistrial at the request of the prosecution. On page 168 of Wiley the Kentucky court prohibits disclosure to the jury the fact of plea bargaining or sentence negotiation. In the McCarty case no disclosure was made to the jury of any specific fact of offer of

deal, or offer of plea bargain, or offer of negotiated sentence. McCarty simply argued a matter of common knowledge that people make deals and argued what was obvious that by being in front of the jury defending himself he made no deal. By arguing common knowledge, McCarty did not open any door, and certainly did not merit the knowingly false argument later presented by the prosecutor. Nevertheless, the Court of Appeals opinion in its analysis of McCarty's counsel's comment relied on Wiley. However, Judge Wilhoit of the Court of Appeals concurred in the result only.

If the prosecutor found the comment of McCarty's counsel to be improper he could have contemporaneously objected and asked that the jury be admonished, and he could have moved for mistrial. Instead, he remained silent. Then during the critical part of his closing argument he accused

McCarty's counsel of having the "gall" to lie to the jury, when in fact McCarty's counsel stated the truth to the jury. Then the prosecutor proceeded to state to the jury: "I didn't offer a deal, and I won't offer a deal in these kinds of case .... I'm not going to make some kind of cut-rate deal in a case that's serious." In fact that very prosecutor in his own hand-writing offered a deal to McCarty prior to January 26, 1990 of two years to serve. The Kentucky attorney general also relied on the "invited response" point contained in pages 11 - 14 of the Young decision. In Young it is stated, beginning at the bottom of page 12: "Thus the import of the evaluation has been that if the prosecutor's remarks were 'invited', and did no more than respond substantially in order to 'right the scale', such comments would not warrant reversing a conviction." McCarty contends

that his comment that people make deals did not invite the prosecutor's deliberately false response, and by no stretch of the imagination did the prosecutor's misconduct right any scale.

The prosecutor's hand-written offer of a 2-year deal or negotiated sentence was filed with the trial court in support of the motion for new trial, but the trial court denied the motion for new trial. The Kentucky attorney general also relied on the Wiley decision in briefing the distinction between plea bargain and negotiated sentence, which is reflected in the Court of Appeals opinion. In a negotiated sentence deal the defendant pleads guilty to the stated charge for a reduced sentence, whereas in a plea bargain deal the defendant pleads guilty to a lesser charge or to a reduced number of counts. The Kentucky attorney general argued, and the Court of Appeals agreed, that the prosecutor only stated that no plea

bargain had been offered to McCarty. The transcript in the record belies this argument by the state of Kentucky and finding by the state Court of Appeals. First, the argument between the prosecutor and the defense counsel about plea bargain and mistrial took place at the bench and out of the hearing of the jury. In fact, in his comment to the jury which was heard by the jury and which is quoted by the Court of Appeals the prosecutor used the word "deal" four times and stated "I didn't offer a deal,....." Simple utilization of a dictionary would show that a plea bargain could be connoted by the word deal and also a negotiated sentence could be connoted by the word deal. The jury in this case was composed of twelve lay persons. There is not even a suggestion in the record that any juror was a judge, or that any juror was an attorney, or that a copy of the Wiley decision was handy to the jury box

so that the jurors could self-educate themselves on a distinction between plea bargain and negotiated sentence.

The decision in Smith v. Phillips, 455 U. S. 209 (1982) also concerns prosecutorial misconduct. In the Smith decision the decisions in Brady v. Maryland, 373 U. S. 83 (1963) and United States v. Agurs, 427 U. S. 97 (1976) are cited. In Brady it was held that due process was violated upon the suppression of requested evidence by a prosecutor where the evidence is material either to guilt or to punishment. In Agurs at page 110 the focus was stated to be not on the character of the prosecutor but on the character of the evidence when assessing constitutional error. At page 219 of Smith the U. S. Supreme Court stated "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." In Darden v. Wainwright,

477 U. S. 168 (1986) the standard stated is "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'". In Caldwell v. Mississippi, 472 U. S. 320 (1985) Justice O'Connor, in her separate opinion, at page 342, finds the inaccurate and misleading remarks by the prosecutor to be impermissible, and indicates a lack of state penological interest in imparting such information. In Darden Justice Blackmun, in his separate opinion, at page 194 in citing earlier decisions of the U. S. Supreme Court states "and the summations cut to the very heart of the Due Process Clause by diverting the jury's attention 'from the ultimate question ....'"

McCarty most strongly contends that the Court of Appeals finding near the end of its opinion that the question of whether or

not McCarty made or was offered a deal was not a significant part of the prosecutor's closing argument is not, under any analysis, tenable. In the sentencing trial the ultimate question, indeed the only question, which the jury had to determine was the number of years of punishment, in a range of one to five years, to impose on McCarty. The McCarty case goes a step beyond diverting the jury's attention from the ultimate question. The prosecutor's comments infected the sentencing trial with the two separate poisons of personal opinion and dishonesty. The prosecutor in his closing argument argued for the imposition of a five-year maximum sentence. He justified this request for the maximum of five years by commenting that this was a serious no-deal case. Specifically, he commented: "I didn't offer a deal, and I won't offer a deal in these kinds of case .... I'm not going to make some kind of cut-rate deal in

a case that's serious." McCarty objected and moved for mistrial. The prosecutor deliberately misled the jury with argument which he knew to be false and which was material to the punishment issue to be determined by the jury. Nothing could be more material to the number of years to be set by the jury than the prosecutor's request for imposition of the maximum number of years coupled with statements that this was a serious, no-deal case. Immediately thereafter the jury went to the jury room to deliberate number of years. This misconduct had a misleading, unfair and prejudicial impact on the jury's deliberations, undermined the fundamental fairness of the sentencing trial, and made the resulting sentence by the jury a denial of due process.

McCarty contends that his petition should be granted and his case reversed

and remanded for a new trial, and further that the misinterpretation of the holding in Young contained in Smith v. Commonwealth, Ky., 734 S.W.2d 437 (1987) should be corrected.

5. Appendix. The Appendix contains the judgment of the McCracken Circuit Court, the opinion of the Court of Appeals Affirming, the Order of the Court of Appeals denying rehearing, and the Order of the Supreme Court of Kentucky denying discretionary review.

Counsel of record for McCarty is:

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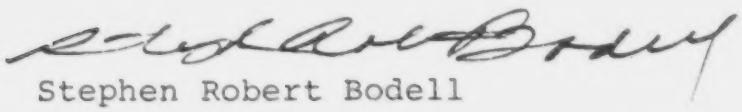

Stephen Robert Bodell

MCCRACKEN CIRCUIT COURT

DIVISION NO. I

COMMONWEALTH OF KENTUCKY, PLAINTIFF

VS.

RICKY THOMAS MCCARTY, DEFENDANT

FINAL JUDGMENT

SENTENCE OF IMPRISONMENT

INDICTMENT NO. 89-CR-149

On the 16th day of March, 1990, the defendant appeared before the Court and was represented by his counsel, Hon. Stephen R. Bodell.

The defendant and his counsel were provided the pre-sentence investigation report prepared by the local Probation and Parole Office and were given an ample opportunity to read same. The defendant and his counsel did controvert statements in the report, and same are noted of record.

Thereafter, the Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defen-

dant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because:

a) There is substantial risk that ____ defendant will commit another crime during any period of probation or conditional discharge.

b) The defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

c) Probation or conditional discharge

would unduly depreciate the seriousness of the defendant's crime.

There being no legal cause shown why sentence not be fixed, IT IS ORDERED that the defendant is guilty of, Count 1, Operating Motor Vehicle While License Suspended for DUI (Third or Subsequent Offense), and Count 3, Driving Under the Influence (Third or Subsequent Offense), and sentence is fixed at 3-½ years on Count 1 and one month on Count 3, to run concurrently with Count 1, for a total sentence of 3-½ years, and a fine of $1,000.00.

IT IS ORDERED THAT the defendant be remanded to the custody of the McCracken County Jailer to await transportation by the McCracken County Sheriff to such institution as the Department of Corrections shall designate, there to serve a sentence of 3-½ years at hard labor.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely, 10 days, as certified by the jailer of McCracken County towards service of the maximum term of imprisonment, and it is noted that defendant's birth date is June 17, 1957.

The defendant being found guilty by a jury of the aforementioned crimes, the Court thereafter advised the defendant that he had a right to appeal the jury's verdicts and that same must be done within ten (10) days of date hereof. The defendant was further advised that he was entitled to counsel on appeal and a transcript of the record and if he could not afford counsel, same would be appointed to represent him, and that if he desired to have the Clerk file notice of appeal for him, the Clerk would be instructed to file same.

It is further Ordered that an appeal bond in the amount of $5,000.00 cash or

property is set, and defendant shall be remanded to the McCracken district jail until arrangements are made for said bond to be made.

It is further Ordered that the defendant shall pay the costs of this action, $65.50, within 60 days.

Dated this 20th day of March, 1990.

/s/ J. W. "Bill" Graves
JUDGE, MCCRACKEN CIRCUIT
COURT, DIVISION NO. I

CLERK'S CERTIFICATE

JUDGMENT ENTERED AND NOTICE OF ENTRY SERVED ON THE DEFENDANT BY MAILING A TRUE COPY TO DEFENDANT'S COUNSEL OF RECORD, HON. STEPHEN R. BODELL, AND ON THE FOLLOWING, THIS 20th DAY OF MARCH, 1990.

/s/ Melissa Prigge D.C.

COMMONWEALTH'S ATTORNEY

PROBATION AND PAROLE

DEPARTMENT OF CORRECTIONS

SHERIFF

JAILER

RENDERED: MARCH 8, 1991; 10:00 A.M.

NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 90-CA-694-MR

RICKY THOMAS MCCARTY APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT

V. HONORABLE J. W. GRAVES, JUDGE

ACTION NO. 89-CR-149

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

BEFORE: HAYES, WEST[1] AND WILHOIT, Judges.

HAYES, JUDGE: Ricky Thomas McCarty appeals the imposition of a four year sentence against him by a McCracken Circuit Court jury (later reduced to three and one-half years by the trial court). We affirm.

The sole issue on appeal concerns statements by the prosecutor during

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[1] This opinion was prepared and concurrences received prior to the death of Judge West.

his closing argument after the sentencing phase of the trial. McCarty had already been convicted of driving while his license was suspended for driving while under the influence (third or subsequent offense), and driving while under the influence (third or subsequent offense). The former charge carried a sentence range of one to five years.[2] Evidently, sometime prior to trial, McCarty had turned down an offer of two years to serve in exchange for pleading guilty.

In closing, after the sentencing phase, McCarty's counsel stated:

> "people make plea bargains, they make deals, they have some major crime and they get probated for so many years, but Ricky McCarty came to court and

---

[2] The latter charge was a misdemeanor; consequently, any time to be served would run concurrent to time on the felony charge. KRS 532.110(1)(a).

faced 12 people and said, 'no deals because it wasn't me that was racing down Old Benton Road.'"

The prosecutor, in his closing statement, observed:

"(counsel) had the gall to stand up here and tell you that Mr. McCarty was brave for not having a plea bargain, for not making a deal. I didn't offer a deal, and I won't offer a deal in these kinds of case .... I'm not going to make some kind of cut-rate deal in a case that's serious."

Appellant's counsel objected to the prosecutor's comments, and the following exchange took place at the bench:

MR. BODELL: "I will make a motion for mistrial. Mr. Osborne offered a two-year plea bargain and Mr. McCarty turned that down. It was communicated to Mr. McCarty when he came to a pre-

trial conference that was held at the end of January, and he declined. That plea bargain offer was two years."

MR. OSBORNE: "The inference was that I was offering a deal where -- "

THE COURT: "This is argument and that's overruled."

MR. OSBORNE: "When you used the word 'Bargain,' that set me off."

MR. BODELL: "I have made a motion and would ask for a ruling."

THE COURT: "I deny your motion for a mistrial."

Thereafter, the jury sentenced McCarty to four years (later reduced to three and one-half years by the trial judge).

Appellant's counsel contends that the Commonwealth, by asserting that no "deals" had been cut, had, at best, injected into the proceedings matters of evidence not already in the record, or, at worst, lied, because a "deal" had, in fact, been offered

and rejected. We disagree for several reasons. First, the prosecutor did not lie to the jury. His specific reference was to the fact that no plea bargain had been offered to McCarty. This is true; McCarty was, in fact, offered a negotiated sentence. The two concepts are distinct. Generally, a plea bargain involves reducing the severity or eliminating certain counts in exchange for a guilty plea. A negotiated sentence contemplates the entry of a guilty plea to the charge as stated in return for a reduced amount of time to be served. Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166 (1978).

Second, if any reference to a deal were erroneous, McCarty's counsel "opened the door" by making a comment in the first place. Neither he nor the prosecutor should have made statements to the jury concerning deals of any kind. Wiley, supra. In any case, the initial reference was on McCarty's

counsel's part, even if only by inference.

Last, presuming that the prosecutor did err, we cannot conclude that his alleged misstatement in any way prejudiced McCarty. The question of whether or not McCarty made, or was offered a deal, was not a significant part of either attorney's closing argument. The jury chose not to impose the maximum sentence allowable. Overall, we perceive that McCarty received his guaranteed due process right to a "fundamentally fair" sentencing hearing. Smith v. Commonwealth, Ky., 734 S.W.2d 437 (1987).

The judgment of the McCracken Circuit Court is affirmed.

WEST, JUDGE, CONCURS.

WILHOIT, JUDGE, CONCURS IN RESULT.

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COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

90-CA-694-MR

RICKY THOMAS MCCARTY APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT

V. HONORABLE J. W. GRAVES, JUDGE

ACTION NO. 89-CR-149

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING

BEFORE: HAYES, LESTER, and WILHOIT, Judges.

The Court, having considered the petition for rehearing and the response, ORDERS that the petition be DENIED.

/s/ Anthony M. Wilhoit
JUDGE, COURT OF APPEALS

ENTERED: JULY 26, 1991

SUPREME COURT OF KENTUCKY

91-SC-677-D

(90-CA-694)

RICKY THOMAS MCCARTY MOVANT

V.

MCCRACKEN CIRCUIT COURT

89-CR-149

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED February 5, 1992.

/s/ Robert F. Stephens
Chief Justice